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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

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No. 195

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., CHESTNUT FARMS-CHEVY CHASE DAIRY COMPANY, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners, Maryland and Virginia Milk Producers Association, Incorporated; B. B. Derrick; Chestnut Farms-Chevy Chase Dairy Company; Thompson's Dairy, Inc.; Richfield Dairy Corporation; Simpson Bros., Inc.; Safeway Stores, Incorporated; Alexandria Dairy Products Company, Incorporated; and Harvey Dairy, Inc. ask the issuance of a Writ of Certiorari to review the judgment below reversing a decision of the District Court of the United States for the District of Columbia which dismissed the indictment herein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1254(1), U. S. Code Judiciary and Judicial Procedure. The decision below was rendered June 17, 1949 (R. 25). The time within which the petition must be filed is governed by Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

Statutes Involved

The Capper-Volstead Act of February 18, 1922, 42 Stat. 388, 7 U. S. C. 291, 292, is as follows:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

* * * * * * *

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

> The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

Section 6 of the Clayton Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. 17, is as follows:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Indictment and Opinion Below

The indictment is printed in full in the record at p. 6. The opinion of the District Court is printed on p. 21 of the record. The opinion below is not yet reported but will be found at p. 25 of the record.

Questions Presented

1. Whether the indictment herein charging a dairymen's co-operative and its contracting distributors with a conspiracy to "eliminate and suppress competition" (Ind. par. 35, R. 12) in the sale and resale of milk is sustainable as a price fixing conspiracy in view, (a) of the immunizing provisions of the Capper-Volstead Act (7 U. S. C. Sec. 291) and Sec. 6 of the Clayton Act (15 U. S. C. Sec. 17); (b) of the absence of "outside" groups, present in *U. S.* v. *Borden,* 308 U. S. 188, see also *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 798; and (c) of the absence of any charge that the co-operative and its contracting distributors conspired *unduly to enhance* the price of milk within the meaning of Sec. 2 of the Capper-Volstead Act.

2. Whether the Capper-Volstead Act, 7 U. S. C. Sec. 291, in providing that agricultural associations in marketing their products "may make the necessary contracts and agreements to effect such purposes" authorizes merely contracts to *purchase* milk from its members. Does it not authorize and immunize contracts with distributors as well, thus making intake and outlet provisions symmetrical?

3. Whether the gist of the indictment being an alleged scheme to "eliminate and suppress competition" (a) by means of full supply contracts, (b) the refusal of the co-operative to sell non-contracting distributors at the same price as defendant distributors, (c) the classification of milk into Classes I, II and III and (d) the alleged agreement of the distributors not to resell fluid milk to the public at prices below the price of Class I milk, this plan of distribution is not, under the Capper-Volstead and Clayton Acts, entirely legal and hence the other acts charged would amount merely to means to make it effective and so could not constitute direct restraints on interstate commerce.

4. Whether as held by the Court below (R. 28), restrictive contracts made under the Capper-Volstead Act by an agricultural co-operative with its contracting distributors, no "outside" groups being involved, are illegal unless approved by the Secretary of Agriculture under the Agricultural Marketing Agreement Act, 7 U. S. C. Sec. 601, *et seq.*

Statement

The District Court (Judge Keech), on motion, dismissed the indictment herein as not stating sufficient facts (R. 21). The Court of Appeals, by a divided court, Judges Edgerton and Morris being the majority, reversed. Judge Miller dissented without opinion (R. 26, 28).

The indictment is summarized by the Court below as follows:

> "The paragraphs of the indictment indicated by the figures in parentheses make substantially the following statements. The appellees are an incorporated Association, the members of which are about 1,500 Maryland and Virginia milk producers who supply 80 percent of the milk sold to distributors in the Washington metropolitan area (20); the Secretary-Treasurer of this Association (9); and seven corporations that distribute milk and its products to consumers and other purchasers in the District of Columbia. These distributors buy and resell 86 percent of all milk supplied to the Washington metropolitan area (21). Appellees have conspired to eliminate and suppress competition in the sale of milk to these distributors, in its purchase by them, and in its resale by them to consumers and other purchasers (35). For those purposes (36, 37) appellees have done these things. Appellee distributors have contracted with appellee Association that they will buy no milk from producers or others who are not members of the Association, but will buy only from the Association, as far as it is able to supply their needs, which it agrees to do as far as it can (36 (a) (b)).

> Appellees have agreed to fix the prices at which the distributors will buy milk (36 (g)) and also the prices at which they will resell it (36 (m)). They have agreed on a classification of milk for price purposes according to use (36 (f) (g)). They have agreed that appellee distributors will remove from the market 'excess' milk, i.e. any milk the Association has for sale in excess of the amount these distributors can resell at the prices agreed upon (36 (n) (o)). They have agreed that the Association will prevent and eliminate competition from distributors not parties to the conspiracy by inducing them not to cut prices, attempting to deprive price-cutters of adequate supplies of milk, interfering with the transportation of milk to them, furnishing milk to appellee distributors at reduced rates for use in taking away contract business from price-cutters, and driving them out of business (36 (p)). They have agreed that the Association will not supply milk, to any distributor not agreeing to buy his full supply from the Association, at prices as low as those charged to appellee distributors (36 (d)). The conspiracy has been successful: 'the defendants by agreement and concerted action have done the things which, as hereinbefore alleged, they conspired to do.' (37)" (R. 26-27.)

The Court below treated the indictment as charging a straight price-fixing conspiracy, in the classic tradition of *U. S.* v. *Socony-Vacuum Co.*, 310 U. S. 150, 218-222. It conceded that the Capper-Volstead Act and the Clayton Act "give some privileges to combinations of agricultural producers," which privileges it did not specify, but disposed of the case on the ground that "a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of an agricultural product is not privileged," citing *U. S.* v. *Borden*, 308 U. S. 188, and *Allen Bradley* v. *Local Union No. 3*, 325 U. S. 798. (R. 27.)

The opinion is disappointing in that it gives no consideration to the vital distinction between the *Borden* and *Allen Bradley* cases and the present, namely the absence in the present case of "outside" groups, whose presence destroyed the immunizing effect of the Capper-Volstead and Clayton Acts in the *Borden* case and the Norris-La Guardia and Clayton Acts in the *Allen Bradley* case. It is as if the opinion below were written prior to *U. S.* v. *Hutcheson*, 312 U. S. 219.

The Court below gives no reasons for its curious holding that fixing prices of milk according to use can only be done under the Agricultural Marketing Agreement Act, unaware, apparently, that the Classified Plan for selling milk antedated that Act and was approved by this Court in *U. S.* v. *Rock Royal Co-operative*, 307 U. S. 533, 549-51, and *Nebbia* v. *N. Y.*, 291 U. S. 502, 518.[1]

Reasons for the Allowance of the Writ

1. This is the first case to reach this Court wherein acts done by an agricultural co-operative with its contracting distributors, in its own self-interest, are charged to be a conspiracy. There are no "outside" groups present, as in *U. S.* v. *Borden*, 308 U. S. 188, 205 and *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 798, 807. We contend that there is no essential difference between the immunities of labor unions, acting in their self-interest, under the Clayton

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[1] See also Gaumnitz & Reed, *Some Problems Involved in Establishing Milk Prices*, pp. 28-31; Metzger, *Co-op Marketing of Milk*, Techn. Bul. No. 179, pp. 17-21, U. S. Dept. of Agr.; Bartlett, *Co-op in Marketing Dairy Products*, pp. 11-12; Horner: *A Comparative Study of Various Fluid Milk Marketing Plans*, American Cooperation, 1926, Vol. II, p. 24.

The Government conceded the validity of classification of milk according to use by expressly inserting a provision to that effect in the consent decree in the *Borden* case. *U. S.* v. *Borden*, D. C. N. Dist. Ill. Eastern Div. No. 2088, Consent Decree, Sept. 16, 1940, par. VI (b).

and La Guardia Acts, and the immunities of an agricultural co-operative under the Clayton and Capper-Volstead Acts. This Court in its opinion in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 798, 807, stated:

> "under our holdings in the *Hutcheson* case and other cases which followed it had there been no union-contractor-manufacturer combination the unions actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act."
>
> "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."

The distributors with whom the co-operative herein made contracts are obviously not "outside" groups. They are the normal, the only, second parties to any contracts the co-operative, on the out-go, can make. The Capper-Volstead Act, 7 U. S. C. 291, provides that agricultural associations may have marketing agencies in common and that "such associations and their members may make the necessary contracts and agreements to effect such purposes." This covers not merely contracts with producers to obtain a full supply of milk but with the distributors to market it. The distributors are thus, on the out-go, the only entities with which the co-operative can, in the nature of things, have any contractual relations at all. Hence a co-operative's contracting distributors cannot be "outside" groups, within the meaning of the *Borden* and *Allen Bradley* cases. Further there is no question here, as in the *Allen Bradley* case, of "employer help" or "distributor help" in "controlling markets and prices"—the motive force of the alleged conspiracy comes from the co-operative and is part of the effort of the co-operative to make itself effective.

In ignoring the above principles the decision of the Court below is in conflict with this Court's decision in *U. S.* v. *Hutcheson,* 312 U. S. 219, 232:

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

The decision below is also in clear conflict with that of the District Court (Oregon) in *U. S.* v. *Dairy Co-operative Association,* 49 F. Supp. 475 wherein, for acts done by a co-operative with distributors alone, the Court refused "to scuttle the plain language of the Clayton Act as to co-operatives, as anti-labor courts scuttled the labor provisions of the same act, with the serious consequences that endure to this hour" (Op. cit. pp. 475-6).

2. The gist of the conspiracy to "eliminate and suppress competition" is the use by the co-operative (a) of full supply contracts; (b) the refusal to sell non-contracting distributors at the same price as defendant distributors; (c) the classification of milk into Classes I, II and III dependent on its use; and (d) the alleged agreement of distributors not to resell fluid milk to the public below the price of Class I milk (R. 12-14). All the other acts charged are merely efforts to put the above plan into effect. If then the plan itself is legal under the Capper-Volstead Act, the other acts would not constitute direct restraints but at most, would fall into the area of State torts. They would resemble the acts done in *U. S.* v. *Hutcheson,* 312 U. S. 219.

Our position is that under the economic conditions peculiar to the fluid milk industry[2] and under the Capper-Volstead and Clayton Acts, the co-operative's marketing

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[2] See *Nebbia* v. *N. Y.,* 291 U. S. 502; *U. S.* v. *Rock Royal Co-operative,* 307 U. S. 533; *Hood & Sons* v. *Dumont,* 336 U. S. 525.

plan was entirely legal. Full supply contracts are traditional in the industry and valid.[3] The co-operative has a natural right to choose its own distributors and can give a price incentive to distributors to make contracts with it.[4] The Classified Plan of basing prices on Class I, II and III milk according to use is a universal custom sustained by the courts and announced as a policy by Federal statutes (See authorities cited in footnote 1, p. 8 herein). Lastly, the provision that distributors must not sell fluid milk below the purchase price of Class I milk simply prevents loss-leaders, follows the policy of the Robinson-Patman Act and prevents distributors buying Class II and III milk and selling it as Class I.

We contend that the above, in aggregate, are all licit under the Capper-Volstead Act. This Court in *United States Alkali Association* v. *U. S.*, 325 U. S. 196, 209-10 stated:

> "This Court rejected the contention that the Capper-Volstead Act gave to the Secretary 'exclusive jurisdiction to determine in the first instance whether the acts of the cooperatives were violations of the Sherman Act because they went beyond the immunity granted by the Capper-Volstead Act.' "

There must then have been *some* immunity granted by the Act. But where is it, if the Court below is correct?

This Court has itself conceded that the Capper-Volstead Act permits co-operatives to interfere with competitive

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[3] Gaumnitz and Reed, *Some Problems Involved in Establishing Milk Prices*, Department of Agriculture 1937, p. 113; Hulbert, *Legal Phases of Co-operative Associations*, Farm Credit Administration Bulletin No. 50, pp. 221, 223; *Pick Mfg. Co.* v. *General Motors Co.*, 299 U. S. 3, 4; *U. S.* v. *Standard Oil of California*, 78 F. Supp. 850, 857, 863; *Standard Oil of California* v. *U. S.*, this Court No. 279, October Term, 1948, decided June 13, 1949. Respondent Simpson Bros., Inc., doubts the validity of full supply contracts, at least under the circumstances disclosed in *Standard Oil Company of California* v. *U. S.*, *supra*.

[4] *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; *U. S.* v. *Colgate & Co.*, 250 U. S. 300.

processes.[5] We think the test is this side of undue enhancement of prices (Capper-Volstead Act, 7 U. S. C., Sec. 291-2). The Court below has ignored this test and denied any coverage at all to the Statute, adopting instead the shibboleth of "price-fixing". But, clearly, intra-mural price fixing is as irrelevant in a case involving an agricultural co-operative as it is in a case involving a labor union.

We conclude, therefore, by asking this Court to grant review, on the ground that the present case is, as to agricultural co-operatives, what *U. S.* v. *Hutcheson, supra* was to Labor; that this Court should synthesize the Sherman Act, the Clayton Act and the Capper-Volstead Act, as it synthesized the Labor Acts in the *Hutcheson* case. We point out that unless this Court does so a long and expensive trial is indicated, with the applicable law in great doubt.[6] This Court has frequently granted certiorari to decide a question "fundamental to the further conduct of the case". *Larson* v. *Domestic & Foreign Commerce Corporation,* No. 31, 1948 term, decided June 27, 1949; *Land* v. *Dollar,* 330 U. S. 731, 734; *U. S.* v. *General Motors Corp.,* 323 U. S. 373, 377.

We also invite attention to the fact that the judges in this jurisdiction are evenly divided as to the validity of the indictment, a circuit judge and a district judge being on each side. This was the situation leading this Court to grant review in *Paramount-Publix Corp.* v. *American Tri-Ergon Corp.,* 294 U. S. 464, and *De Forest Radio Co.* v.

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[5] *Associated Press* v. *U. S.,* 326 U. S. 1, 14, and footnote 13, 31 and footnote 1; see also *U. S.* v. *Elm Spring Farm,* 38 F. Supp. 508, 510; *Board of Trade* v. *Wallace,* 66 F. (2d) 402, 408.

[6] For instance, the opinion below (R. 28) makes *any* contract between the co-operative and the distributors, particularly if it involves the fixing of price by use (the Classified Milk Plan), illegal, unless the Secretary of Agriculture approves it. This opinion might be binding on the trial court.

General Electric Co., 283 U. S. 664, 669, neither of which appear to have been as important as the present case.

Conclusion

The Petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

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No. 195

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., CHESTNUT FARMS-CHEVY CHASE DAIRY COMPANY, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The oral opinion of the District Court appears at page 21 of the record. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 25) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 17, 1949 (R. 29). This petition for certiorari was filed July 15, 1949. The jurisdiction of

this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED

Whether a combination between a milk producers association, its officer, and seven distributors, to fix the price of milk sold by the distributors to consumers and by the association to the distributors, to suppress competition by other distributors, and otherwise to control the market for milk in their area, is exempted from the prohibitions of the Sherman Act by the provisions of the Capper-Volstead and Clayton Acts.

STATUTES INVOLVED

Section 3 of the Sherman Act, 26 Stat. 209 (15 U.S.C. 3), provides:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be

punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

The Capper-Volstead Act of February 18, 1922, 42 Stat. 388 (7 U.S.C. 291, 292) and Section 6 of the Clayton Act of October 15, 1914, 38 Stat. 731 (15 U.S.C. 17) are set forth in the Appendix, *infra*, pp. 11-14.

STATEMENT

This case involves the validity of an indictment filed March 8, 1948, in the United States District Court for the District of Columbia charging a combination and conspiracy in restraint of trade, in violation of Section 3 of the Sherman Act (R. 6). Two of petitioners filed motions to dismiss, on the grounds that the indictment failed to state facts sufficient to constitute an offense, and was duplicitous (R. 18-20). The district court, in an oral opinion, held that the indictment was not duplicitous but that it should be dismissed for failure to state an offense (R. 21-22). The United States, interpreting the decision as based solely upon a construction of the Sherman Act, appealed directly to this Court under the Criminal Appeals Act, Title 18, United States Code, Sec. 3731 (R. 23). After this Court had granted petitioners' motion to remand the case to the Court of Appeals for the District of Columbia Circuit (335 U.S. 802, R. 24), that court reversed the judgment of dismissal and remanded

the case to the district court for further proceedings. (R. 29).

The defendants named in the indictment, the petitioners here, are the Maryland and Virginia Milk Producers Association, the membership of which consists of approximately 1500 Maryland and Virginia milk producers supplying approximately 80% of the milk sold to distributors in the Washington metropolitan area (R. 6, 10); the Secretary-Treasurer of this Association (R. 8); and seven corporations, milk distributors, which purchase milk and cream from producers and resell them and the products processed therefrom, to consumers and other purchasers in the Washington metropolitan area (R. 6-11). These distributors purchase and resell 86% of all milk supplied in this area (R. 10, 11).

The principal allegations of the indictment are: The petitioners have conspired to eliminate and suppress competition in the sale of milk to, and its purchase by, the petitioner distributors, and in its resale to consumers and other purchasers in the Washington metropolitan area (R. 12). This conspiracy has consisted of continuing agreement and concert of action among the petitioners, as follows. The distributors have agreed to purchase their entire requirements of milk from petitioner Association to the extent that it can supply their needs, and to buy no milk from producers who are not members of the Association (R. 12). The Association has agreed to supply the distributors so far

as possible, to charge each distributor identical prices for milk, and to refuse to supply milk to independent distributors except at higher prices (R. 13). Petitioners have agreed on a classification of milk based solely on the use to which the milk is to be put by the distributors, for purposes of establishing price levels for such milk irrespective of quality (R. 13). The petitioners have agreed to fix the prices at which the distributors will purchase milk from the Association (R. 13) and the prices at which the distributors will resell milk to consumers and others (R. 15). The petitioners have agreed that whenever the amount of milk available for sale by the Association exceeds the amount which the distributors can resell as fluid milk at the prices agreed upon, the distributors will remove the excess from the market by purchasing and converting it into products other than fluid milk, even though the distributors might thereby suffer financial loss (R. 15). The petitioners have agreed that the Association will prevent and eliminate competition in the sale of fluid milk from distributors who are not parties to the conspiracy, by inducing them not to cut prices, attempting to deprive price-cutters of adequate supplies of milk, interfering with the transportation of milk to them, furnishing milk to the petitioner distributors at reduced prices for use in taking away contract business from the price-cutters, and otherwise driving them out of business (R. 15-16).

The indictment further alleges that the con-

spiracy has had the intended effect; that petitioners have gained control of the production, sale, and distribution of approximately 80% of the milk consumed in the Washington metropolitan area; have fixed prices for the sale of fluid milk in that area, resulting in increased prices to consumers and other purchasers; have prevented the importation of fluid milk from other sources; have deprived non-members of the Association of the opportunity to sell milk to petitioner distributors; and have deprived independent distributors of the opportunity to purchase milk from members of the Association (R. 16-17).

ARGUMENT

1. The decision below is plainly correct.

The petitioners do not dispute that the concerted price fixing of fluid milk sold by the Association to the distributors and resold by the distributors to consumers and others, and the conspiracy to suppress competition in the Washington market by concerted price cutting, boycotts, and other means, constitute violations of the Sherman Act unless privileged by later legislation.

Petitioners place almost exclusive reliance upon the alleged immunizing effect of provisions of the Capper-Volstead Act granting to agricultural producers a limited exemption from the antitrust laws. But we submit that this contention is foreclosed by the decision in *United States* v. *Borden Company*, 308 U.S. 188, which ruled adversely on the identical issues raised here. There, as here, the principal

defendants were distributors of milk in a city marketing area and a cooperative association of milk producers from which these distributors purchased most of their milk. There, also, the defendants were charged with conspiring to restrain trade and fix prices in the sale of milk from producers to distributors and in the sale of milk by distributors to consumers and others, and with conspiring to eliminate the competition of independent distributors. This Court rejected the argument that the Capper-Volstead Act authorized these activities. It held (pp. 204-205) that that Act merely grants to agricultural producers the right to act collectively in marketing their product and that it "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise."

The object of the Capper-Volstead Act "is to authorize the producers of agricultural products to form associations for the purpose of collectively * * * marketing their products * * * It is not [intended] to place these associations above the [Sherman Act] but to grant them the same immunity from prosecution that corporations * * * enjoy * * *" H. Rep. No. 24, 67th Cong., 1st Sess., pp. 1, 3. Petitioners have gone considerably beyond collective action by producers in the marketing of their milk. The producers' association, in addition to marketing collectively, has conspired with distributors controlling a major portion of the market to fix prices for fluid milk at every level of the marketing pro-

cess, including sales to consumers as well as from producers to distributors. In addition, they have conspired to suppress competition from other distributors and producers by concerted price cutting, interfering with transportation facilities, and other invalid means. Such action far exceeds the limited right of agricultural producers to combine with each other granted by the Capper-Volstead Act.

Petitioners attempt to distinguish the *Borden* case upon the ground that the indictment in that case named as defendants, in addition to the producers' association and the distributors, certain municipal officials, labor officials, and a labor union. But the holding in the *Borden* case does not turn on the number or character of the other parties with whom the producers had combined, but on the nature and scope of the conspiracy entered into between the producers and outside groups. And the terms of this conspiracy were substantially identical with that in the case at bar.

So far as there is a parallel in the exemption from the antitrust laws granted to labor unions by the Clayton Act, the decisions of this Court sustain the view that the exemption is limited to collective bargaining by the association for the initial sale of producers' milk and does not encompass combining and conspiring with distributors to fix prices for resale to the public and to bar all competitors from the area. In *Allen Bradley Company* v. *Local Union No. 3*, 325 U.S. 797, this Court held that the

collective bargaining privilege did not authorize labor unions to "aid non-labor groups to create business monopolies and to control the marketing of goods and service." (p. 808). "When the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions * * *" (p. 809). To the same effect is *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 400.

During the major portions of the period covered by the conspiracy charged in the instant case no marketing order issued by the Secretary of Agriculture under the Agriculture Marketing Agreement Act of 1937, 50 Stat. 246 (7 U.S.C. 601), was in effect in the Washington metropolitan area. The *Borden* case explicitly holds (pp. 196-203) that the provisions of the Marketing Agreement Act give no immunity from the Sherman Act in these circumstances.

2. The judgment of the Court of Appeals is not final, but merely reverses the district court's judgment sustaining petitioners' motion to dismiss the indictment and remands the case to that court for further proceedings. The general rule is that the writ of certiorari will not be issued to review a judgment or decree which is not final. *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U.S. 251, 258; *Hanover Milling Company* v. *Metcalf,* 240 U.S. 403, 408-409. Here there are persuasive reasons for adherence to the general rule. Aside from the

substantial delay in bringing petitioners to trial, the question sought to be raised by petitioners need not be determined at this stage of the litigation. The petitioners' principal contention is that their activities are all within the exemption from the Sherman Act provided for agricultural marketing cooperatives by the Capper-Volstead Act. It would appear that the limits of the exemption granted by the Capper-Volstead Act can be determined more accurately, and therefore more appropriately, upon the basis of a factual record setting forth the precise nature of petitioners' activities rather than defined in the abstract with reference to the necessarily generalized allegations of the indictment. *Kennedy* v. *Silas Mason Company,* 334 U.S. 249, 257; cf. *United States* v. *Petrillo,* 332 U.S. 1, 12.

In *American Medical Association* v. *United States,* 310 U.S. 644, this Court declined to grant certiorari to review a decision of the Court of Appeals for the District of Columbia which had reversed a judgment dismissing the indictment, even though some of the questions as to construction of the statute which the petition for certiorari had presented were deemed worthy of review by certiorari after trial of the cause. *American Medical Association* v. *United States,* 317 U.S. 519, 527-528.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1949.

APPENDIX

The Capper-Volstead Act of February 18, 1922, 42 Stat. 388, 7 U.S.C. 291, 292, is as follows:

> * * * That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

SEC. 2. That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district

court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall

be binding upon such association, the officers, and members thereof.

Section 6 of the Clayton Act of October 15, 1914, 38 Stat. 731, 15 U.S.C. 17, is as follows:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 195

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., CHESTNUT FARMS-CHEVY CHASE DAIRY COMPANY, ET AL., *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF AMICUS CURIAE, NATIONAL COOPERATIVE MILK PRODUCERS FEDERATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable the Supreme Court of the United States:

The National Cooperative Milk Producers Federation, as amicus curiae, respectfully states:

I.

STATEMENT OF THE CASE.

This case originated in the United States District Court for the District of Columbia by the return therein of an indictment charging petitioners with having conspired to suppress competition and restrain trade in the sale of milk in the Washington area (R. 6). Petitioner Maryland and

Virginia Milk Producers Association, Inc., is a cooperative association of dairymen and is engaged in the business of selling milk at wholesale for its producer members. The remaining petitioners are milk dealers who purchase milk from the cooperative and sell it at retail as fluid milk, or otherwise process it.

The District Court dismissed the indictment on the ground that it did not set forth sufficient facts to properly plead a conspiracy in violation of the Sherman Act. After an unsuccessful attempt to appeal directly to this court (*United States* v. *Maryland and Virginia Milk Producers Assn., Inc.*, 69 S. Ct. 35) the case was transferred to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals by a divided opinion (thus putting one district judge and one circuit judge on each side of the question) reversed the District Court and decided important questions of Federal law, which have not been, but should be, settled by this court. The opinion of the Court of Appeals is not yet reported but will be found at page 25 of the record.

The questions raised by the Court of Appeals involve among other things the right of cooperatives entitled to protection under the Capper-Volstead Act (1) to bargain collectively with milk dealers for the sale of the products of the cooperative and in connection with such bargaining to set the price which the cooperative will charge for its products, (2) to make such contracts and agreements as may be necessary to market the products of the cooperative, and (3) to use as a basis for pricing its products a system of classified use prices.

II.

ARGUMENT.

Summary of the Argument.

Point A. Amicus Curiae, National Cooperative Milk Producers Federation, is a national non-trading Federation of dairy cooperative associations engaged in the marketing of milk and dairy products and as such interested in the principles of law involved in this case.

Point B. The decision in this case, insofar as it bears on the rights and immunities of cooperative associations engaged in the marketing of milk or other agricultural products, affects many such cooperatives doing a large volume of business and thus indirectly affects the economy of the nation as a whole.

Point C. The issues raised by the decision of the Court of Appeals are important questions of Federal law, which have not been, but should be, settled by this Court.

Point A.

Amicus curiae, National Cooperative Milk Producers Federation, is an organization representing on a nationwide scale producers of milk who market their products through cooperatives. Approximately one-fifth of the milk sold from farms in the United States is marketed through cooperatives which are members or submembers of the Federation. Many of these cooperatives market fluid milk wholesale in large metropolitan areas. Petitioner Maryland and Virginia Milk Producers Association, Inc., is a member of the Federation. The principles of law established in this case, bearing as they do upon the rights and immunities of such cooperatives under the antitrust laws, are of direct concern to the Federation and its members.

Point B.

The decision of the Court of Appeals affects an important industry, namely, the cooperative marketing of agricultural products by producers. A Department of Agriculture Release dated August 19, 1949 shows a total dollar-volume of business transacted by farmers marketing cooperatives for the 1947-48 season of approximately 6.8 billion dollars, with dairy products accounting for approximately 1.9 billion of this total.

The decision below creates confusion and uncertainty which, until settled by this Court, must necessarily result in decreased efficiency in the operation of such cooperatives and in consequent ill effect upon the economy of the nation as a whole.

Point C.

The important questions of Federal law raised by the Court of Appeals have not been, but should be, settled by this Court, and this should be done at the earliest opportunity. Numerous prosecutions have been commenced against cooperatives, and others are likely to follow if the uncertainties raised in this case are not settled. The Department of Justice should be provided with a clear-cut guide to govern such prosecutions; and cooperatives should have the benefit of settled rules of law so that they may know definitely what their rights are.

The rights of labor under the antitrust laws have been defined and settled by this Court (*United States* v. *Hutcheson et al.*, 312 U. S. 219, 61 S. Ct. 463). The rights of cooperatives should be equally well defined and settled.

The consent decree in the Borden case (*United States* v. *The Borden Company et al.*, U. S. District Court N. D. Ill., No. 2088, entered Sept. 16, 1940), recognized the right of a cooperative to bargain collectively with milk dealers for the sale of the products of the cooperative and to set the price to be charged for its products as a result of such bargaining. The Court of Appeals has ruled in effect that all price fixing agreements are illegal, without making

proper exceptions for the right of cooperatives to fix the price of their own products through collective bargaining. The decision of the Supreme Court in the case of *United States* v. *Borden,* 308 U. S. 188, 60 S. Ct. 182, cited in the Court's opinion, while it refers specifically to the rights granted by Section 1 of the Capper-Volstead Act did not define such rights; that decision was a negative one setting forth what the cooperative could not do rather than what it could do.

The Capper-Volstead Act (7 U.S.C. Sec. 291, 42 Stat. 388) expressly authorizes cooperatives to make such agreements and contracts as may be necessary to market their products. It is necessary in the marketing of milk, a highly perishable commodity, for cooperatives to contract in advance for an assured outlet for the milk. This is frequently done by the use of full supply contracts with dealers.

The decision of the Court of Appeals casts a doubt on the validity of full supply contracts, even though they may have been entered into in good faith, if the result of such contracts is to foreclose competitors from any substantial market.

The history of the Act as contained in the hearings before the Congressional Committees (Hearings, House Judiciary Committee on H. R. 7783, 66th Congress (Serial No. 7); Hearings, Senate Judiciary Subcommittee on S. 845, 66th Congress; Hearings, Senate Judiciary Subcommittee on H. R. 2373, 67th Congress) and the debates in both houses of the Congress (59 Cong. Record pp. 7857, 8034, 8037; 60 Cong. Record pp. 376, 377, 571; 61 Cong. Record pp. 98, 424, 1032, 1034, 1041, 1042, 1043, 1044, 2281; 62 Cong. Record pp. 2048, 2049, 2121, 2122, 2123, 2173, 2174, 2273, 2274, 2275, 2279), clearly shows that it was the intent of Congress that there should be no criminal prosecution of marketing cooperatives for contracts or agreements made in carrying out their marketing operations as specifically authorized by said Act. The legislative history further shows that Section 2 of the Act was expressly intended

as a remedy, at least in the first instance, in case of restraints of trade or monopoly or attempted monopoly as a direct result of the activities specifically authorized in Section 1 of said Act.

The principle of pricing milk according to the use made of it has been in use for many years and was adopted and approved by Congress as a proper and efficient method for the pricing of milk in Federal milk marketing orders (7 U.S.C. Sec. 608c(5)(A)), and upheld by this Court in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 59 S. Ct. 1019; *United States* v. *Rock Royal Co-op. et al.*, 307 U. S. 533, 59 S. Ct. 993. This method of determining the price which a cooperative will charge for its milk is in common use both with and without Federal orders. The decision of the lower court raises serious questions as to the legality of such price classifications when not used in connection with Federal milk marketing orders.

CONCLUSION.

The Court properly can we believe, and we respectfully pray that it will, take this opportunity to define and settle the general principles of law here involved and thus end the uncertainty and confusion which otherwise will beset and retard cooperative marketing until such time as that is done.

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